Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-904

In The Supreme Court

OF THE

United States

OCTOBER TERM 1984

J. H. MCQUISTON,
Petitioner,
VS.
THE UNITED STATES,
Respondent.

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

B. ALAN DICKSON
KAUFMAN, FRANKLIN & DICKSON
Century Park Center
9911 West Pico Blvd., Suite 650
Los Angeles, California 90035
Telephone: (213) 553-3351
Attorneys for Petitioner

12pp

TABLE OF AUTHORITIES

	Page
Acorn Iron v. Bethlehem Steel Co, 96 F Supp 481 (E.D. Pa 1951)	4, 5, 9
Buckley v. Valeo, 424 U.S. 1 (1976)	2
Eastern Air Lines v. McDonnell Douglas, 532 F2d 957 (5 Cir 1976)	6, 3, 6
I.N.S. v. Chadha, _____ U.S. _____, 103 S. Ct 2764, 51 LW 4907 (1983)	2
In re Agent Orange Litigation, 597 F Supp 740 (MDL, E.D.N.Y. 1984)	3, 4
Lynch v. U.S., 292 U.S. 571 (1934)	2
McDonnell Douglas Corp, 83-1 BCA ¶16,377 (1983)	5
McQuiston, 83-1 BCA ¶16,187 (1983)	5
Mt Healthy School Dist v. Doyle, 429 U.S. 274 (1977)	7
Roxford Knitting v. Moore & Tierney, 265 F. 177, (2d Cir. 1920)	6
U.S. v. Bianchi, 373 U.S. 709 (1963)	6
U.S. v. Grace & Sons, 384 U.S. 424 (1966)	6
U.S. v. Texas Construction, 224 F2d 289 (5 Cir 1955)	3
U.S. v. Utah Construction, 384 U.S. 394 (1966)	5, 6
Village of Arlington Hts v. Metro Housing Dev, 429 U.S. 252 (1977)	7
Woods Hole v. U.S., 677 F2d 149 (1 Cir 1982)	5
Constitution, Statutes, & Regulations:	
Art III	2, 6, 9
Amt V	2
50 U.S.C. App §§2061 *et seq* (Defense Production Act)	*passim*
50 U.S.C. App §2073	2
§2152	2, 5, 9

Constitution, Statutes, & Regulations (cont):
50 U.S.C. App §2156 ..... 2, 9
§2157 ..... 2, 3
15 C.F.R. 350 2
32A C.F.R. 651 2

Miscellaneous:
Madison: *The Federalist,* No 47 2
Memorandum on Constitutionality of Sec 2751, P.L. 98-369, U.S. Dept of Justice, Office of Legal Counsel (1984) 2
Report of Chairman, ASBCA, Regarding Yearly Transactions and Proceedings 1
S. Rep 82-1599, 82d Congress (1952) 4
U.S. Code Congressional & Administrative News (1952) 4

No. 84-904

In The Supreme Court of the United States

OCTOBER TERM 1984

J. H. MCQUISTON, *Petitioner,*

VS.

THE UNITED STATES, *Respondent.*

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The argument set forth in the Memorandum of Opposition raises issues, which necessitates a Reply thereto.

1. The Solicitor General, for Respondent, admitted to a belief that a U.S. agent, which procures goods for resale to customers at a profit, is engaging in a "public" act (jure imperii) and not a commercial or "private" act (jure gestionis). That admission is proof that Petitioner McQuiston correctly characterized the First Question he put to this Court as substantial and controversial.

It is substantial because it affects Constitutional rights to just compensation and due process not only for McQuiston but also for 12 million contractors *every year.* It is controversial because the aforementioned belief of the Solicitor General is being used *unfairly* in ASBCA to confiscate just compensation and due process rights of over 1,000 involuntary contractors *every year.*[1] Nearly 65% of contractors treated thusly are small businesses, unable to bring injustices to this Court for proper review thereof.

Unless this Court grants certiorari in this case, agencies will continue to *force* substantial numbers of unwilling small busi-

[1]Source: Yearly Report of Chairman, ASBCA, to Secretaries, DOD/Army/Navy/Air Force, re Transactions & Proceedings in ASBCA.

nesses into ASBCA, abusing a contractor's Constitutional right to an independent adjudicator. Such unfair process also abuses the Board's adjudicators, who feel the threat of replacement if their decisions do not curry favor with the agencies.[2]

> In *I.N.S. v Chadha,* ____ U.S.____ (1983), this Court said: "Questions may occur which we would gladly avoid; but we cannot avoid them."

McQuiston believes that Question One has now been presented in an unavoidable case for this Court to decide.

2. The Solicitor General also admitted to a belief that Sec. 101 of the Defense Production Act (DPA) empowers the President to compel the production of materiel for National Defense at the President's sole discretion, and that any person refusing to produce shall be punished as a criminal under 50 U.S.C. App. §2073.[3] But the Solicitor General admitted to a belief that the *quid pro quo* for such power, immunity guaranteed by Sec. 707 (50 U.S.C. App. §2157), is revocable by the *agency party* to the contract, despite contrary language in 50 U.S.C. App. §§2152(a) & 2156(b).[4] Those admissions are proof that McQuiston correctly characterized the Second Question he put to this court as substantial and controversial.

It is substantial because it affects Constitutional rights to just compensation, equal protection and due process not only for McQuiston but also for the 12 million contractors jeopardized in

---

[2]October 17, 1984, the DOJ Office of Legal Counsel, citing *Buckley v Valeo,* 424 U.S. 1, 120-21 (1976) and *The Federalist,* No 47, essentially *agreed with McQuiston* that forcing commercial contracts of U.S. into non-Art III forums is unconstitutional. See DOJ *Memorandum on Constitutionality of* Sec 2751, P.L. 98-369, slip op at 8-9 (1984).

[3]Also, 32A CFR 651 (now 15 CFR 350) Sec 28(b) prescribed that any person refusing cooperation with DPA procurements may be enjoined from making any purchases or sales, or using any materials or facilities, whatsoever.

[4]But the U.S. may not retroactively abridge a contractual right (immunity) granted as *quid pro quo,* after receiving value. Amt V; *Lynch v. U.S.,* 292 U.S. 571, 579 (1934).

#1, supra. It is controversial because the Solicitor General's theory would render every citizen defenseless against confiscatory procurement acts of agencies taken in the name of National Defense.

For exactly the same reason as in #1, supra, McQuiston believes that Question Two has now been presented in an unavoidable case for this Court to decide.

3. The Solicitor General denies that CAFC's reading of DPA conflicts with other Circuits, and in the Memorandum n.5 challenged McQuiston to Reply with evidence of the conflict. Without overloading this Reply, McQuiston cites *In re Agent Orange Litigation*, 597 F Supp 740 (MDL, E.D. N.Y. 1984), wherein at 843-845 the Chief Judge in the Multi-District Litigation was required to decide whether Sec. 707 (50 U.S.C. App. §2157) immunized DPA contractors from product-liability tort actions as well as from contractual default actions. The court cited *Eastern Air Lines v. McDonnell Douglas*, 532 F2d 957 (5 Cir 1976), as did McQuiston in support of this reading of Section 707.[5] In conclusion the *Orange* court said:

> "that Section 707 was enacted as the *quid pro quo* to Section 101, the section authorizing the President to compel acceptance and give high priority to defense contracts." *Agent Orange*, 597 F Supp at 845.

Eastern of course cites an avalanche of cases from various Circuits and from this Court, too numerous to mention.

While *U.S. v. Texas Const. Co*, 224 F2d 289 (5 Cir 1955) describes a close parallel to the case at bar, DPA wasn't enacted before the time the *Texas* contract was entered into.

---

[5]See, e.g., 532 F2d 957 at 992-998. The court decided that even informal telephone requests are "orders" under DPA, and that "even if we were to conclude that the DPA did not authorize informal priority efforts, McDonnell would be exonerated by a provision of the Act which exculpates any compliance with a government order regardless of whether it is later determined to be invalid. 50 App. U.S.C. §2157." *Eastern* at 994 n.105.

But *Acorn Iron v. Bethlehem Steel*, 96 F Supp 481 (E.D. Pa 1951) is on all fours with this case.[6]

Merely by affirming that the prohibition of penalties as set forth in *Acorn* applies to penalty clauses of agencies party to DPA contracts, this Court will settle the controversy and enable McQuiston to obtain restitution for the unfair "taking". Thus McQuiston will be able to resume practicing his real profession as a "think-tank" and engineer.

Surely these chains of authorities, unanimously and solidly supporting the interpretation McQuiston has urged upon every adjudicator including this Court, and totally at odds with CAFC's interpretation of DPA immunity, present substantial proof that thee is a split within the Circuits, one that this Court should resolve in favor of McQuiston and *Acorn*.

Nevertheless, the Solicitor General at p.5 of Memorandum flatly states, "The decision in *Acorn* is not relevant to the issue presented by petitioner. Nothing in *Acorn* or DPA limits the government's power to terminate an overdue contract." The Solicitor

---

[6] "As the *quid pro quo* for performance of the contracts, defense contractors are protected from 'liab(ility) for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with...this Act.' * * * It is indisputable that the statutory ancestors of Section 707 only immunized contractors from liability for breach of contract damages; the law was explicit on that point. 'No person..shall be held liable for damages or penalties *for any default under any contract or order* which shall result directly or indirectly from his compliance with...this section.' * * * [A] number of references in the statutory history about the time the statute was reenacted as the DPA of 1950 indicate a desire by Congress not to limit the immunity to contractual breaches. For example * * *:

'The first sentence of Section 707 of the act contains the so-called exculpatory clause, which protects a person from liability, *under contract or otherwise*, as the result of compliance with * * * the act, even though it was recognized that common-law doctrines, such as frustration and impossibility of performance and the like, would cover many of the same cases.' S. Rep No 1599, 82d Cong, 2d Sess, 1952 U.S. Code Cong & Ad News 1789, 1818 (emphasis added)

"The last sentence in the quoted section of the Senate Report is certainly consistent with the interpretation that no change was intended in the scope of Section 707." *Agent Orange*, 597 F Supp at 844

General makes two erroneous assumptions in these statements.

First, McQuiston never suggested that an *agency* cannot terminate a contract at will, even if the contract is *not* overdue. Clearly, an agency may terminate at will, but not for *penalty;* McQuiston's text said so at page 30.

Second, *Acorn* is precisely relevant to an agency's DPA contract because the DPA statute (50 U.S.C. App. §2152(a)) prescribes that an agency shall be treated exactly like any *other* contractor and *not* like an imperial sovereign. Thus the Solicitor General's term "the government's power", rather than "a contractor's power" or "an agency's power", implies a boldly-presumptuous appropriation of sovereign power which DPA specifically prohibits.

4. The Solicitor General newly raises facts allegedly decided by ASBCA and thereafter argues that these facts may not be redetermined by any reviewing court as the gravamen of why certiorari should not be granted in this case. This argument compels a specific reply because it goes beyond the Questions McQuiston presented to this Court.

For the Solicitor General to argue that ASBCA's findings of fact are final and binding upon any court with jurisdiction requires *first* that ASBCA was properly authorized to make such findings,[7] and *second* that a finding of ASBCA properly binds a court of the United States under the Constitution and laws of the United States. These prerequisites are the Questions which McQuiston presented to this Court, answers to which are required *before* reaching the Solicitor General's question relative to the support in the record for the ASBCA findings.

The Solicitor General cites *United States v. Utah Construction &*

---

[7]ASBCA recognized that the agency's allegation of McQuiston's default was an agency claim *against a contractor,* and such jurisdiction in ASBCA for pre-CDA cases was questionable. *McDonnell-Douglas Corp,* 83-1 BCA 16,377 (1983), citing *Woods Hole v. U.S.,* 677 F2d 149 (1 Cir 1982) (no jurisdiction for agency claims). ASBCA in *McDonnell* cited *McQuiston* for authority supporting jurisdiction, and refused to follow *Woods Hole.*

Mining Co., 384 U.S. 394 (1966) for the proposition that factual issues concerning government contracts resolved by an administrative board are not to be tried *de novo* by a reviewing court. This argument is spurious in the present context and seriously misleads the Court, for *Utah* concerned a *consensual* contract in which the contractor had *voluntarily* limited its remedies and choice of forum. The present controversy arises, by stark contrast, from a *dictated* undertaking recognized by the courts in *Roxford Knitting v. Moore & Tierney*, 265 F. 177 (2d Cir. 1920) and in *Eastern* at 994 as being non-consensual despite being expressed in the format of a bilateral contract. McQuiston was thus forced to litigate in a non-Article III forum in circumstances utterly different from the consensual contracts containing "disputes" clauses that were interpreted by this Court in a famous trio of cases: *Utah; United States v.* Bianchi, 373 U.S. 709 (1963); *United States v. Grace & Sons, Inc.*, 384 U.S. 424 (1966).

Nevertheless, it is McQuiston's belief that the flat statements the Solicitor General alleges from the record are contradicted by *other* flat statements *also* found in the record.[8] To the extent that the ASBCA opinion is self-contradictory regarding the necessary facts, it will *not* support agency allegations that McQuiston was derelict per DPA or acted venally.

The gravamen of the *factual* question raised by the Solicitor General is: Assuming that the *quid pro quo* immunity granted McQuiston by the President is voidable by the agency party to the contract-in-commerce after value was received, do the facts on record support conclusions that the immunity *should* be voided and penalties *should* be imposed against McQuiston?

To void the immunity, the Solicitor General alleged:

> "Because the sales price was higher under the second contract, petitioner used relays he had ordered for the contract at issue in networks delivered under the second contract (A-27)." Mem. at 1-2.

---

[8]It appears that the ASBCA intended to make its decision internally contradictory, and thereby reversible on factual and legal grounds.

But McQuiston may have delivered networks simply to comply with orders he received from the Command, instead of for the venality alleged.

In examining the record for facts supporting the agency, we find only that McQuiston believed that the price charged him for the relays on both contracts would be exactly the same. (A-27, #27) *Per se,* there would be no advantage to incorporating relays from one contract into networks on another contract.

The price differential between these contracts would be attributable to the variation-in-quantity, date-of-order, and place-of-delivery. There is no evidence in the record which allocates the cost of goods sold and the overhead to the two unequal contracts. The production history (A-4) shows a great variation in price caused by quantity, time variables and place-of-delivery. Without an audit there is no clear proof of which contract was more profitable. Finally, regularity of conduct is *presumed* in the face of a statute like DPA providing for heavy penalties for misconduct. Thus the record will not support the Solicitor General's bare allegation of venality as improper conduct. There is no *prima facie* case.[9]

If the record had contained evidence supporting a *prima facie* case of venality, then McQuiston would have been allowed to present witnesses showing that his deliveries were solely at the discretion and under the control of the Command. The record (Tr at 1836-1849) shows McQuiston was first promised a hearing to present his witnesses on this issue ("Judge Gomez: I'll see you at the next session."), but the record also shows that ASBCA thereafter

---

[9]In *Village of Arlington Hts v. Metro Housing Dev,* 429 U.S. 252, 264-268 (1977) this Court prescribed a procedure to determine which alternative motivation was dispositive. More fully explained in *Mt Healthy v. Doyle,* 429 U.S. 274, 287 (1977), it briefly is:

1. The party alleging an invidious act must establish a *prima facie* case, showing that the intention to act invidiously was a substantial factor in the event that took place.

2. The alleging party having carried the burden to establish the *prima facie* case, the injuring party then must show by a preponderance of the evidence that it would have acted the same even without the invidious act, and if so the act is deemed not to be causative.

and *sua sponte* prohibited McQuiston from presenting the witnesses.

Nevertheless, the record *does* show that McQuiston delivered Networks in accordance with the terms of the contracts and under the close supervision of agency overseers, implying that the deliveries were *proper* or else the overseers would not have accepted them (A-27, #27 & 28). See also Pet. at 31-32. Venality could not affect the schedule.

Similarly, the Solicitor General alleged:

> "Petitioner did not seek government assistance in obtaining delivery of the relays under the DPS until after the delivery date had passed (A-44)." Mem. at 2.

This statement is *belied* by specific ASBCA findings which the Solicitor General also urged upon this court.[10] They say McQuiston timely and repeatedly sought assistance, before the alleged Oct 16, 1979 contract date was reached.

Obviously the ASBCA conclusions (A-44 & 45) conflict with the ASBCA findings (A-31 & 36). The record proves no *prima facie* case that McQuiston invidiously neglected the DPA process.

---

[10] "[Appellant] expected Kilovac to meet the scheduled deliveries with 'little or no problem whatsoever.' (A-26, #26)

"Appellant completed delivery on contract -0621 on 15 June, 1979 * * *." (A-27, #27)

"It first became apparent to appellant that deliveries under the instant contract might require priority assistance when it received a 24 August 1979 letter from Kilovac * * *." (A-31, #33)

"We have no doubt that appellant, accordingly, was capable of delivering the balance within the remaining two months." (A-40)

"Troubled by Kilovac's opinion that production could not be required except in time of war, appellant asked the DCASR office [27 Aug, 1979] to send Kilovac a copy of the DPS bulletin. * * * On 13 Sept 1979, * * * [o]ne of the DCASR representatives requested that appellant obtain 3 other sources to facilitate the processing of a * * * priority assistance action. The 3 other sources were required because DCASR no longer processed requests involving sole sources; however, the DCASR representative stated that he would talk to Kilovac, and see if just "jawboning" would help the situation." (A-31, #33 & 34; A-34, #38)

"The DCASR representative indicated [to Kilovac] that the Government would not tell them how to run their business." (A-36, #41)

Nevertheless, the *style* of attack in the Solicitor General's Memorandum clearly demonstrates the urgent necessity for this Court to grant certiorari in this case and settle *authoritatively* the immunity rights of DPA contractors.

5. To declare the rights of DPA contractors, McQuiston prays this court to grant certiorari for both Questions Presented, vacate the judgement of the Court of Appeals for the Federal Circuit and ASBCA, and remand for *de novo* consideration in an Article III court (CAFC), ordering the court to consider in light of *Acorn Iron v. Bethlehem Steel Co,* 96 F Supp 481 (E.D. Penn 1951) that contract-clause default *penalties* may not be assessed against DPA contractors by any person, including agencies of the United States, as defined by DPA in Sections 2152(a) & 2156 of Title 50 Appendix, United States Code, notwithstanding any penalty clause which may have been present in the DPA contract.

To declare the rights of all government contractors, McQuiston prays this court to prescribe additionally:

Commercial contract disputes of the United States are henceforth to be afforded the right of *de novo* review in the *initial* court of the United States, analogous to the review rights for disputes between parties not agencies of the United States. The right to such analogous review may not be impaired by the United States or its agents. However, the parties may elect to waive the review-right if waiver is freely given.

Respectfully submitted,

Date: February 15, 1985

B. Alan Dickson
Kaufman Franklin & Dickson
Attorneys for Petitioner